No. 99 259 AUG 12 1999

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In The
Supreme Court of the United States

ALBERTO O. LOZADA COLON,

Petitioner,

v.

DEPARTMENT OF STATE, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

A. Whether the Court of Appeals erred in finding that the Secretary of State has discretion under 8 U.S.C. § 1501 to deny a Certificate of Loss of Nationality to a person who has relinquished his United States citizenship voluntarily under 8 U.S.C. § 1485(a)(5)?

B. Whether the Court of Appeals erred in finding that the writ of mandamus was inappropriate in this case despite the lack of availability of judicial review or other remedy for persons denied a Certificate of Loss of Nationality?

C. Whether the denial of a Certificate of Loss of Nationality violated Lozada's rights to equal protection of the law?

LIST OF ALL PARTIES

Alberto O. Lozada Colon, Petitioner;

Madeline Albright, Janet Reno, John Warner, Mrs. Sherley Crawford, Department of State;

Manuel Rivera, Counsel for the Petitioner;

Wilma A. Lewis, United States Attorney, R. Craig Lawrence and Daria J. Zane, Assistant United States Attorneys, Frank W. Hunger, Assistant Attorney General, Mark C. Walters and Linda S. Wernery, Attorneys Office of Immigration Litigation Civil Division, U.S. Department of Justice, Catherine W. Brown, Assistant Legal Adviser United States Department of State.

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The March 23, 1999 opinion of the United Court of Appeals for the District of Columbia Circuit, Pet. App. 1[1], is unreported.

BASIS FOR JURISDICTION IN THIS COURT

Following a hearing, the U.S. District Court entered a final judgment on April 23, 1998 granting defendants' motion to dismiss the writ of mandamus petition and fulfilling the prerequisite requirement for appellate jurisdiction under 28 U.S.C. § 1291 to the U.S. Court of Appeals for the District of Columbia. Appeal was taken by timely notice of appeal on May 22, 1998.

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[1]"Pet. App." references are to the Appendices to the Petition.

On March 23, 1999, the Court of Appeals entered a judgment affirming the U.S. District Court decision to dismiss a writ of mandamus petition against the Secretary of State. On May 4, 1999, a petition for rehearing and suggestion for rehearing en banc was filed. On May 20, 1999, the petition for rehearing and suggestion for rehearing en banc was denied. This Court has jurisdiction to review the U.S. Court of Appeals for the District of Columbia Circuit's decision pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATION INVOLVED

The statutory provisions involved include the sections of the Immigration and Nationality Act ("INA") outlining the circumstances U.S. citizens can lose their nationality and citizenship, the Secretary of States' duties to issue a certificate of Loss of Nationality, Judicial Review of the denial of a CLN, the grant of citizenship to Puerto Rican nationals, Puerto Rico and United States compact agreement and the Federal Relations Act 1950. These statutory provisions are the following: 8 U.S.C. 1481(a)(5):

> (a) A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily performing any of the following acts with the intention of relinquishing United States nationality--
> (5) making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State.

The INA, 8 U.S.C. § 1501, provides for a certificate of diplomatic or consular officer of the United States as to loss of American nationality

> Whenever a diplomatic or consular officer of the United States has reason to believe that a person while in a foreign state has lost his United States nationality under any provision of chapter 3 of this title, or under any provision of chapter IV of the Nationality Act of 1940, as amended, he shall certify the facts upon which such belief is based to the Department of State, in writing, under regulations prescribed by the Secretary of State. If the report of the diplomatic or consular officer is approved by the Secretary of State, a copy of the certificate shall be forwarded to the Attorney General, for his information, and the diplomatic or consular office in which the report was made shall be directed to forward a copy of the certificate to the person to whom it relates. Approval by the Secretary of State of a certificate under this section shall constitute a final administrative determination of loss of United States nationality under this Act, subject to such procedures for administrative appeal as the Secretary may prescribe by regulation, and also shall constitute a denial of a right or privilege of United States nationality for purposes of section 1503 of this title.

The statute of limitations begins to run upon the issuance of the CLN by the Secretary of State for purposes of seeking judicial review pursuant to 8 U.S.C. § 1503:

> (a) Proceedings for declaration of United States nationality. If any person who is within the United States claims a right or privilege as a national of the United States

> and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of title 28, United States Code, against the head of such department or independent agency for a judgment declaring him to be a national of the United States, except that no such action may be instituted in any case if the issue of such person's status as a national of the United States (1) arose by reason of, or in connection with any removal proceeding under the provisions of this or any other act, or (2) is in issue in any such removal proceeding. An action under this subsection may be instituted only within five years after the final administrative denial of such right or privilege and shall be filed in the district court of the United States for the district in which such person resides or claims a residence, and jurisdiction over such officials in such cases is hereby conferred upon those courts.

22 C.F.R. § 50.40, Certification of loss of U.S. nationality, the regulation that helps implement 8 U.S.C. § 1501 and 8 U.S.C. § 1481 states as follow:

> (a) Administrative presumption. In adjudicating potentially expatriating acts pursuant to INA 349(a), the Department has adopted an administrative presumption regarding certain acts and the intent to commit them. U.S. citizens who naturalize in a foreign country; take a routine oath of allegiance; or accept non-policy level

employment with a foreign government need not submit evidence of intent to retain U.S. nationality. In these three classes of cases, intent to retain U.S. citizenship will be presumed. A person who affirmatively asserts to a consular officer, after he or she has committed a potentially expatriating act, that it was his or her intent to relinquish U.S. citizenship will lose his or her U.S. citizenship. In other loss of nationality cases, the consular officer will ascertain whether or not there is evidence of intent to relinquish U.S. nationality.

(b) Whenever a person admits that he or she had the intent to relinquish citizenship by the voluntary and intentional performance of one of the acts specified in Section 349(a) of the Immigration and Nationality Act, and the person consents to the execution of an affidavit to that effect, the diplomatic or consular officer shall attach such affidavit to the certificate of loss of nationality.

(c) Whenever a diplomatic or consular officer has reason to believe that a person, while in a foreign country, has lost his U.S. nationality under any provision of chapter 3 of title III of the Immigration and Nationality Act of 1952, or under any provision of chapter IV of the Nationality Act of 1940, as amended, he shall prepare a certificate of loss of nationality containing the facts upon which such belief is based and shall forward the certificate to the Department.

> (d) If the diplomatic or consular officer determines that any document containing information relevant to the statements in the certificate of loss of nationality should not be attached to the certificate, the person may summarize the pertinent information in the appropriate section of the certificate and send the documents together with the certificate to the Department.
>
> (e) If the certificate of loss of nationality is approved by the Department, a copy shall be forwarded to the Immigration and Naturalization Service, Department of Justice. The diplomatic or consular office in which the certificate was prepared shall then forward a copy of the certificate to the person to whom it relates or his representative.

Section 7 of the Foraker Act, 31 Stat. 77 (1900), 48 U.S.C. § 731, states as follows:

> That all inhabitants continuing to reside therein who were Spanish subjects on the eleventh day of April, eighteen hundred and ninety-nine, and then resided in Puerto Rico, and their children born subsequent thereto, shall be deemed and held to be citizens of Puerto Rico, as such entitled to the protection of the United States, except such as shall have elected to preserve their allegiance to the Crown of Spain on or before the eleventh day of April, nineteen hundred, in accordance with the provisions of the treaty of peace between the United States and Spain on the eleventh day of April, eighteen hundred and ninety-nine; and they, together with such

> citizens of the United States as may reside in Puerto Rico, shall constitute a body politic under the name of The People of Puerto Rico, with governmental powers as hereinafter conferred, and with power to sue and be sued as such.

Section 5 of the Jones Act, 39 Stat. 951 (1917), 48 U.S.C. § 731, identify which Puerto Rican nationals were being made U.S. citizens. The statute states in pertinent part:

> That all citizens of Puerto Rico, as defined by section seven of the Act of April twelfth, nineteen hundred, "temporarily to provide revenues and a civil government for Puerto Rico, and for other purposes," and all natives of Puerto Rico who were temporarily absent from that island on April eleventh, eighteen hundred and ninety-nine, and have since returned and are permanently residing in that island, and are not citizens of any foreign country, are hereby declared, and shall be deemed and held to be, citizens of the United States; Provided, That any person hereinafter described may retain his present political status by making a declaration, under oath, of his decisions to do so within six months of the taking effect of this Act before the district court in the district in which he resides[.]

The INA § 202, 54 Stat. 1139 (1940) provided that:

> All persons born in Puerto Rico on or after April 11, 1899, subject to the jurisdiction of the United States, residing on the effective date of this Act in Puerto Rico or other territory over which the United States

> exercises rights of sovereignty and not citizens of the United States under any other Act, are hereby declared to be citizens of the United States.

The INA, 8 U.S.C. § 1402 (1952) provides that:

> All persons born in Puerto Rico on or after April 11, 1899, and prior to January 13, 1941, subject to the jurisdiction of the United States, residing on January 13, 1941, in Puerto Rico or other territory over which the United States exercises rights of sovereignty and not citizens of the United States under any other Act, are hereby declared to be citizens of the United States as of January 13, 1941. All persons born in Puerto Rico on or after January 13, 1941, and subject to the jurisdiction of the United States, are citizens of the United States at birth.

The INA, 8 U.S.C. § 1101 defines the terms, national, state and United States.

> (22) The term "national of the United States" means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.
>
> (36) The term "State" includes the District of Columbia, Puerto Rico, Guam, and the Virgin Islands of the United States.
>
> (38) The term "United States," except as otherwise specifically herein provided, when

used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States.

STATEMENT OF THE CASE

The facts

Petitioner, Alberto O. Lozada Colon, was born in Cabo Rojo, Puerto Rico, on November 2, 1952, being the child of Ovidio Lozada-Torres and Lillian J. Colon-Colon, both of whom also were born in Puerto Rico. Petitioner is a lawyer and the Puerto Rican Independence Party 1996 candidate for Mayor of the City of Mayaguez. On September 23, 1996, he appeared before John Warner, the United States Vice-Consul for the Dominican Republic, and informed Warner of his intent to renounce his U.S. citizenship pursuant to 8 U.S.C. § 1481(a)(5). He signed an Oath of Renunciation of the Nationality of the United States and a Statement of Understanding. He also presented a sworn statement, in Spanish, indicating the reasons for his renunciation. Said renunciation was intentional, clear, and unequivocal, and complied with all requirements of 8 U.S.C. § 1481(a)(5).

Petitioner's United States passport was retained by Warner at the moment the documents were signed. Warner informed him that the procedure of renunciation was complete and that no document would be issued in relation with the same at that time. He was also informed that he could not enter the United States.

During November and December 1996 and January 1997, Petitioner called Warner on several occasions to inquire about the issuance of a CLN. He was informed by Warner that a report on his case had been forwarded to the Secretary of State pursuant to 8 U.S.C. § 1501 and 22 C.F.R. §§ 50.41(a) and 50.50(b), and a telephone number was given

to Petitioner for further inquiries to the Department of State in Washington, D.C. He made several calls to the Department of State and was referred to Shirley Crawford of the Overseas Citizens Services. Petitioner informed Crawford of the details of his renunciation, and she promised to inform him of the status of the case in a few days. However, he never received the response promised. He again called Crawford, she informed him that the Department of State had no information or documents pertaining to him. Upon his repeated requests for further investigation, Crawford finally admitted that the Department of State had received the documents and that the same had been referred to another division of the Department of State.

On February 5, 1997, he mailed a letter to Secretary of State, requesting issuance of a CLN. Copies of said letter were sent to Appellee Janet Reno, Attorney General, and to Warner. No reply was issued. On August 13, 1997, he filed a petition for a Writ of Mandamus in the U.S. District Court for the District of Columbia. Prior to petitioner's renunciation, two CLNs have previously been issued in relation to renouncement of United States citizenship by Puerto Rican citizens. One was issued to Juan Mari Bras on November 22, 1995 and the other to Pablo Marcano on April 4, 1996. These certificates did not acknowledge the fact that the effected persons remained citizens of Puerto Rico. Mari Bras was specifically told that he had become a stateless person.

On January 27, 1998, Petitioner received a letter from the Secretary of State stating the reasons for denying the CLN. The letter stated that he had not met his burden for relinquishing U.S. citizenship by establishing by the preponderance of the evidence his intent to renounce U.S. citizenship because he claimed a right to reside in Puerto Rico, a territory of the U.S. without being registered as a properly documented immigrant alien. A hearing was held, after which the District Court dismissed Petitioner's petition for a Writ of Mandamus. In its opinion, the District Court

characterized the political status of Puerto Rico as an incorporated territory similar to the District of Columbia or a state. Petitioner filed a timely appeal from this judgment on May 22, 1998.

Statement of Facts Relevant to the Issues Presented for Review

On December 10, 1898, the Treaty of Paris was signed and ratified by the Senate and was signed by the President on February 6, 1899. 30 Stat. 1754. Spain relinquished all claim of sovereignty over Cuba, and ceded the islands of Puerto Rico, Guam, and the Philippines to the United States. This treaty made Puerto Rico a domestic territory—not an organized territory in the legal sense, *Downes v Bidwell*, 182 U.S. 244 (1901), in that it merely belongs to but is not part of the U.S. *Balzac v. Puerto Rico*, 258 U.S. 298, 305-06 (1922). The Treaty of Paris provided that "[t]he civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." Under the power of the Treaty, an act was created temporarily to provide revenues and a civil government for Puerto Rico. This act was approved in April 12, 1900 and is known as the Foraker Act, 31 Stat. 77, 48 U.S.C. § 731. A civil government was formed on the island which was composed of a Governor, Secretary, Attorney General, and other officers, appointed by the President, by and with the advice and consent of the Senate, who, with five other persons, also appointed and confirmed, constituted an executive council. Local legislative powers were vested in a legislative assembly consisting of the executive council and a house of delegates to be elected by the people of Puerto Rico. A provision also was made for the election of a commissioner to the United States, to be paid a salary by the United States, but no person was eligible to such election who was not a bona fide citizen of Puerto Rico, who was not thirty years of

age, and who did not know how to read and write the English language. Furthermore, by § 7 of the Foraker Act, the inhabitants of Puerto Rico, who were Spanish subjects on the day the treaty was proclaimed, including Spaniards of the Peninsula who had not elected to preserve their allegiance to the Spanish Crown, were to be deemed citizens of Puerto Rico, and they and the citizens of the United States residing in Puerto Rico constituted a body politic under the name of the People of Puerto Rico. On March 2, 1917, President Wilson signed the law granting U.S. citizenship to Puerto Ricans, Jones Act, 39 Stat. 951, 48 U.S.C. § 731. The Jones Act made U.S. citizens only those persons recognized in § 7 of the Foraker Act as citizens of Puerto Rico. On October 14, 1940, again Congress approved legislation to make citizens of the U.S. all those person born after April 11, 1899 and residing in Puerto Rico on the effective date of the Act. On June 27, 1952, again Congress approved legislation to make all persons born in Puerto Rico after April 11, 1899 and before January 13, 1941 U.S. citizens, and to make all persons born in Puerto Rico on or after January 13, 1941 U.S. citizens at birth. Nothing in these legislations were made to repeal the 1917 Jones Act in relation to the people that decided to retain their political status as citizens of Puerto Rico by their sworn statements. In fact, Congress in 1927 amended the Jones Act to protect American-born citizens from the mainland living in Puerto Rico. The amendment stated that those U.S. citizens who resided in the island for one year shall be citizens of Puerto Rico. Ch. 503, § 2, 44 Stat. 1418 (1927).

In 1952, Puerto Rico attained a form of self-government. The final text of the Constitution was approved at the Constitutional Convention on February 4, 1952, *see* Pub. L. No. 600, 64 Stat. 319, 48 U.S.C. §§ 731b et seq. (1950) and the Puerto Rican Federal Relations Act, 75 Stat. 245, 48 U.S.C. § 745 (1961).

On July 3, 1952, President Harry S. Truman signed Pub. L. No. 447, 66 Stat. 327, 48 U.S.C. § 731d (1952),

approving the Constitution of Puerto Rico. In 1953, the U.S. informed the United Nations (U.N.) that it would cease transmitting information pursuant to Article 73(e) of the U.N. charter as the result of Puerto Rico having achieved self-government. Thereafter, the U.N. General Assembly approved Resolution 748(VII), which recognized that the people of Puerto Rico have exercised its right to self-determination and that it has been vested with attributes of political sovereignty. *See* G.A. Res. 748(VII), 18th Sess., Supp. No. 15, pt. I, U.N. Doc. A/C.35/L.121 (1953).

On November 18, 1997, the Supreme Court of Puerto Rico in the case of *Miriam J. Ramirez de Ferrer v. Juan Mari Bras*, No. CT-96-14, held that the citizenship of Puerto Rico has its own vitality, independent from U.S. citizenship, and its juridical source is the Constitution of the Commonwealth. Moreover, the opinion says that a Puerto Rican citizen who gives up U.S. citizenship does not become an alien with regard to his/her relationship with the Commonwealth of Puerto Rico.

REASONS FOR GRANTING THE WRIT

A. Federal Courts Do Not Treat the Issues Raised by This Case in a Uniform Manner And There Is No Case That have Dealt With The Right to Expatriation

The court and the agency below did not dispute the fact that Petitioner made a formal renunciation pursuant to 8 U.S.C. 1481(a)(5). However, it is disputed whether the Secretary of State has discretion to deny a CLN, pursuant 8 U.S.C. 1501, to a U.S. citizen who voluntarily relinquish it. The court maintains that the Secretary of State has discretion to deny a CLN to a U.S. citizen despite the lack of judicial review availability. According to the court, a writ of mandamus would not be an appropriate remedy here. Moreover, this case turns on the court's interpretation of 8

U.S.C. § 1501, 8 U.S.C. § 1503 of the INA and 22 CFR § 50.40.

For example, 22 C.F.R. § 50.40(a) clearly mandates that "A person who affirmatively asserts to a consular officer, after he or she has committed a potentially expatriating act, that it was his or her intent to relinquish U.S.citizenship will lose his or her U.S. citizenship." Furthermore, the regulation states that "[I]n other loss of nationality cases, the consular officer will ascertain whether or not there is evidence of intent to relinquish U.S. nationality." According to this section of the statute, if there is *prima facie* evidence that a U.S. citizen has loss his nationality the consulate official, pursuant to 22 C.F.R. § 50.40(b) "shall prepare a certificate of loss of nationality containing the facts upon which such belief is based and shall forward the certificate to the Department." "If the certificate of loss of nationality is approved by the Department, a copy shall be forwarded to the Immigration and Naturalization Service, Department of Justice. The diplomatic or consular office in which the certificate was prepared shall then forward a copy of the certificate to the person to whom it relates or his representative." *22 C.F.R. § 50.40(e)*. The regulation makes a distinction between people that atomically loses their U.S. citizenship intentionally and those that have committed expatriating acts without the intent of losing it. Thus, the regulation mandates the loss of U.S. citizenship to a person who asserts to a consular officer, after committing a potentially expatriating act, that it was his intent to relinquish U.S. citizenship. In all other cases, the statute and regulations mandates the diplomatic or consular officer to prepare the certificate of loss of nationality and forward this to the Department of State for final approval. Therefore, it appears that the Secretary of State's discretion is reserved for involuntary renunciations unrelated to 8 U.S.C. § 1481(a)(5).

Moreover, the language of the regulation does not provide an appeal process for the denial of a certificate of

loss of nationality. *See 22 CFR § 50.52.* This is consistent with the view that a denial of a certificate of loss of nationality does not constitute an administrative adjudicating procedure until approved because the renunciation process is a purely ministerial act. The renunciation of U.S. citizenship is an irrevocable act and if the act is voluntary, the loss of citizenship should always be upheld.

B. A Writ Of Mandamus Will Be Proper Here Because Of The Lack Of Judicial Review Availability For A Person Who Has Been Denied A CLN

There are two court circuits cases with an opposite view about the Secretary of State duties under section 1501, Whitehead v. Haig, 794 F2d 115 (3d Cir. 1986) and Heuer v. Secretary of State, 20 F.3d 424 (11th Cir. 1994). In Whitehead, supra, the third Circuit Court held that the denial of a passport, not the issuance of the CLN, triggered the statute of limitation under section 1503 for purposes of judicial review. The court concluded that the Secretary of State did not have discretion to deny a CLN because under section 1501 his duties were purely ministerial. Therefore, the statute of limitation did not start to run upon issuance of the CLN.

On the other hand, in Heuer, supra, the eleventh Circuit Court held that the statute of limitation started to run upon issuance of the CLN because the Secretary of State's duties were not ministerial. Both courts in Whitehead and Heuer reasoned that it would be burdensome for the government to produce evidence and witnesses many years after the event of expatriation occurred. But the court in Whitehead concluded that it was up to Congress, not the court, to make the statute specific as to which event triggered under section 1501 the statute of limitation for purposes of bringing an action under section 1503.

The legislative history of section 1501 shows that Congress intended the Secretary of State's power to be

ministerial when issuing a CLN. In Whitehead, 794 F.2d at 118, the court stated as follows: "Section 1501 is not a statute specifying a procedure for the administrative "determination" of a claim of a right or privilege as a national of the United States. The functions required of the various entities are purely ministerial. The language of the statute itself does not speak in terms common to those prescribing administrative procedures. It speaks only in terms directing an automatic transmittal, for informational purposes, of certified facts related to the expatriation of a United States citizen. Legislative history of the section confirms our view that § 1501 was not intended to provide any mechanism for administrative adjudication or determination by the Secretary of State as part of its mandate to approve and issue the Certificate of Loss."

Judge Becker, in Whitehead, stated that although he was uncertain that Congress intended that claims could be brought under § 1503 such a long time after the lost of citizenship, the statutory language compelled that interpretation, and that it was for Congress to amend the statute if it objected to the results. Whitehead at 119 n.5. He also feared that the holding in Whitehead, placed a serious burden on the government to preserve records indefinitely and presented significant problems of proof at trials.

However, it was not until the Heuer decision that Congress decided to change the statute. On October 25, 1994, five months after *Heuer* was decided, Congress settled the issue by amending section 1501 to read:

> Approval by the Secretary of State of a certificate under this section shall constitute a final administrative determination of loss of United States nationality under this Act, subject to such procedures for administrative appeal as the Secretary may prescribe by regulation, and also shall constitute a denial of a right or privilege of United States

> of a right or privilege of United States nationality for purposes of section 360 [*8 U.S.C. section 1503*].
> It appears that in response to Judge Becker's comments in Whitehead, supra, Congress amended section 1501 and stated:
>
> > [t]his section responds to the court decision in *Whitehead v Haig*, 794 F.2d 115 (3rd Cir. 1986). . . . This amendment would make clear that issuance of a [CLN] is a final administrative action subject to judicial review." 139 Cong. Rec. S8554 (daily ed. July 1, 1993).

The statute now clearly provides that approval of the CLN constitutes a final administrative determination subject to judicial review. There is no mention of what constitutes a denial. Therefore, approval of the CLN is a final administrative determination subject to judicial review, but denial is not. Since denial of the CLN is not a final administrative determination subject to judicial review, therefore, a writ of mandamus is the proper course of action to compel the Secretary of State to issue a CLN.

C. A Denial of the CLN Violated Lozada's Rights to Equal Protection of the Law.

By issuing CLNs to other U.S. citizens who have relinquished U.S. citizenship under § 1481(a)(5) and have acquired another nationality but not issuing a CLN to Lozada, the Department of State has discriminated against Lozada based on his Puerto Rican nationality. It has been established in numerous cases beginning with *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), that discrimination classification of a group by race or national origin violates

the Fourteenth Amendment. The Court has held repeatedly that the Due Process Clause of the Fifth Amendment includes an equal protection component that bars the federal government from discriminating. *Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Puerto Ricans are "subject to the constitutional guarantees of due process and equal protection of the law." *Rivera-Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 7 (1982).

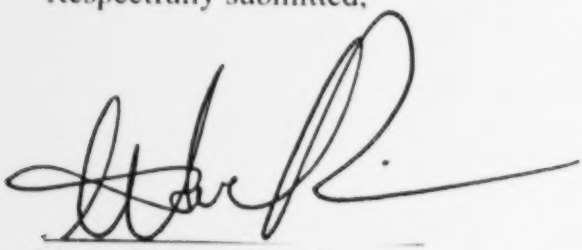
The Supreme Court held in *Schneider v. Rusk*, 377 U.S. 163 (1964), that the government was precluded by the equal protection component of the Fifth Amendment Due Process Clause from discriminating against naturalized citizens as distinguished from native born citizens. If, as was the case in *Schneider*, the federal government is barred from discriminating between two classes of constitutional citizens, by the same reasoning it is likewise barred from discriminating among different classes of statutory citizens.

The United States Supreme Court would subject to heightened scrutiny citizenship distinctions based on suspect classifications. See Miller v. Albright, 118 S. Ct. 1428 (1998). Likewise, violation of the Equal Protection Clause and the Due Process Clause occurs where a person is denied a CLN because he claims to be a citizen and national of Puerto Rico.

CONCLUSION

The petition should be granted.

Respectfully submitted,



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July 23, 1999

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ALBERTO O. LOZADA COLON,
APPELLANT

v.

UNITED STATES DEPARTMENT OF STATE, ET AL.,
APPELLEES

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-5179

170 F.3d 191; 1999 U.S. App. LEXIS 4846

FILED: March 23, 1999
ENTERED: March 23, 1999

PRIOR HISTORY: [*1] Appeal from the United States District Court for the District of Columbia. (No. 97cv1457).

DISPOSITION: Affirmed.

COUNSEL: For ALBERTO O. LOZADA COLON, Plaintiff - Appellant: Manuel Rivera, Jr., Law Office of Manuel Rivera, Jr., Arlington, VA.

For DEPARTMENT OF STATE, MADELEINE K. ALBRIGHT, JANET RENO, JOHN WARNER, SHERLEY CRAWFORD, Defendants - Appellees: Wilma Antoinette Lewis, U.S. Attorney, R. Craig Lawrence, Assistant U.S. Attorney, Daria J. Zane, U.S. Attorney's Office, Mark C. Walters, Linda S. Wernery, U.S. Department of Justice (DOJ), Office of Immigration Litigation, Catherine W. Brown, U. S. Department of State (DOS), Office of the Legal Adviser, Frank W. Hunger, Assistant Attorney

General, U.S. Department of Justice (DOJ), Appellate Staff, Washington, DC.

JUDGES: Before: EDWARDS, Chief Judge, SENTELLE and HENDERSON, Circuit Judges.

OPINION: JUDGMENT

This cause came to be heard on appeal from an opinion and judgment of the United States District Court for the District of Columbia, *Lozada Colon v. U.S. Dep't of State, 2 F. Supp. 2d 43 (D.D.C. 1998)*, and was briefed by counsel. The issues have been accorded full consideration by the Court, and it is

ORDERED and ADJUDGED that the judgment of the District Court, denying plaintiff's request for mandamus relief, be affirmed. We agree with the District Court that mandamus relief is inappropriate here, because *8 U.S.C. § 1501* clearly affords the Secretary discretion to determine whether a Certificate of Loss of Nationality should be issued. See 13 *th Regional Corp. v. U.S. Dep't of Interior, 210 U.S. App. D.C. 43, 654 F.2d 758, 760 (D.C. Cir. 1980)* ("Mandamus will issue 'only where the duty to be performed is ministerial and the obligation to act peremptory, and plainly defined. The law must not only authorize the demanded action, but require it; the duty must [*2] be clear and indisputable.' ") (quoting *United States ex rel. McLennan v. Wilbur, 283 U.S. 414, 420, 75 L. Ed. 1148, 51 S. Ct. 502 (1931))*; accord *Heckler v. Ringer, 466 U.S. 602, 616, 80 L. Ed. 2d 622, 104 S. Ct. 2013 (1984)* (mandamus is only appropriate if "the defendant owes [the plaintiff] a clear nondiscretionary duty"). We also find no merit in plaintiff's equal protection claims, raised for the first time on appeal.

In affirming, we find it unnecessary to decide whether the plaintiff, Lozada Colon, failed to show that there was no other remedy, save mandamus, available to persons denied a Certificate of Loss of Nationality. Accordingly, we do not

address any issues concerning the availability of judicial review for persons denied a Certificate of Loss of Nationality, nor do we affirm any of the District Court's views on this matter. Matters regarding the availability of review, outside of mandamus, can be decided another day in a case properly raising these issues.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. See FED. R. APP. P. 41(b); [*3] D.C. CIR. R. 41.

Per Curiam

ALBERTO O. LOZADA COLON,
Plaintiff,

v.

U.S. DEPARTMENT OF STATE, et al.,
Defendants.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 97-1831

2 F. Supp. 2d 43; 1998 U.S. Dist. LEXIS 6093

Decided: April 22, 1998
FILED: April 23, 1998
ENTERED: April 23, 1998

DISPOSITION: [**1] Defendants' Motion to Dismiss GRANTED.

CORE TERMS: certificate, nationality, renunciation, citizenship, certification, Nationality Act, writ of mandamus, issuance, mandamus, disapproval, renounce, sentence, consular, final administrative, expatriate, oath, reside, moot

COUNSEL: For ALBERTO O. LOZADA COLON, plaintiff: Manuel Rivera, Jr., Arlington, VA.

For DEPARTMENT OF STATE, MADELEINE ALBRIGHT, JANET RENO, JOHN WARNER, SHERLEY CRAWFORD, federal defendants: Daria Jean Zane, U.S. ATTORNEY'S OFFICE, Philip Dean Bartz, U.S. DEPARTMENT OF JUSTICE, Washington, DC.

JUDGES: Stanley Sporkin, United States District Judge.

OPINIONBY: Stanley Sporkin

OPINION: [*44] MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Defendants' Motion to Dismiss. In August of 1997, Plaintiff filed a Petition for a Writ of Mandamus to compel a decision by the Department of State on his application for a Certificate of Loss of Nationality ("CLN"). Defendants argue that because the State Department has finally issued its decision denying Plaintiff the certificate he seeks, Plaintiff's request is moot. Moreover, Defendants allege that Plaintiff's contention now that the Secretary of State's decision was wrong cannot properly be reviewed in a petition for a writ of mandamus.

Plaintiff, a United States Citizen born in Puerto Rico, seeks to renounce his United States citizenship and yet still reside and remain in Puerto Rico as a Puerto [**2] Rican national despite the fact that Puerto Rico is a territory of the United States. To that end, on September 23, 1996, Plaintiff appeared before a United States consular officer in the Dominican Republic and executed an oath of renunciation of nationality, as provided for in § 349 (a) (6) of the Immigration and Nationality Act, *8 U.S.C. § 1481*. The Vice-consul certified this act to the United States Secretary of State for approval or disapproval. If approved, a Certificate of Loss of Nationality would issue to the Plaintiff, as prescribed in § 358 of the Immigration and Nationality Act, *8 U.S.C. § 1501*.

Nearly a year after Plaintiff had taken his oath of renunciation, the Secretary of State still had not returned a decision on the validity of his renunciation. Thus in August of 1997, Plaintiff filed a Petition for a Writ of Mandamus asking this Court to compel the State Department to make a decision as to Plaintiff's renunciation of citizenship. On August 26, 1997, this Court issued a show cause order directing the Department to state why the Writ should not

issue within 60 days of the service of that order. The Department responded with a request to extend the time within [**3] which to respond given that it anticipated a decision from the Secretary of State on Plaintiff's certification shortly. On January 27, 1998, the Secretary of State disapproved Plaintiff's renunciation and declined to issue a Certificate of Loss of Nationality. Plaintiff was immediately notified of this decision. Thus, the Department contends that the case has become moot; there no longer remains any action to be taken by the State Department as requested by Plaintiff in his Petition before this Court.

Despite the fact that the State Department has issued its decision, Plaintiff contends that there still remains a valid claim for a Writ of Mandamus. While Plaintiff's Petition for the most part requests only a final decision from the Secretary of State, Plaintiff also seeks in his prayer for relief that this Court not only order the Secretary to render a decision, but render a positive decision in favor of Plaintiff's request for a certificate of loss of nationality. Given that the Department's decision was not in favor of Plaintiff's request, Plaintiff now contends that the decision was clearly in error. In support of his position, Plaintiff advances four alternative arguments: 1) [**4] since the denial of Plaintiff's certificate was not a final agency decision and thus not subject to judicial review, he argues that a writ of mandamus is the only adequate remedy available to him; 2) he argues that the issuance of a certificate is not a discretionary power of the Secretary of State; 3) he questions whether the State Department has the constitutional authority even to adjudicate such claims of renunciation; and 4) even if the Congress has legitimately conferred on the State Department the power to adjudicate, he argues that he has complied with each and every requirement of the statute.

Despite the Secretary's decision, Plaintiff contends that mandamus relief remains available in this case because the decision to deny certification is not legally cognizable as a final administrative determination under *8 U.S.C. § 1501.*

Section 1501 provides in relevant part, "Approval by the Secretary of State of a certificate under this section shall constitute a final administrative determination of loss of United States nationality under this chapter subject to such procedures for administrative appeal as the Secretary may prescribe by regulation, and also shall constitute a denial [**5] of a right or privilege [*45] of United States nationality for purposes of section 1503 of this title." Id. Plaintiff argues that because the last sentence of this section states only that an approval of a certificate is a final administrative determination, the denial of one clearly is not. Accordingly, Plaintiff argues that without a writ of mandamus, there is no means by which he can appeal the Secretary's adverse decision.

Plaintiff reads the words of the statute out of context. The final sentence of the section refers only to approval of a certificate because its purpose is to delineate when the statute of limitations begins to run for purposes of an appeal to the Board of Appellate Review under 22 C.F.R. § 7.5 or an action under § 360 of the Immigration and Nationality Act, *8 U.S.C. § 1503.* In both of these situations, a denial of a certificate is irrelevant because when one is denied, the individual retains citizenship and thus is not subject to a decision under either 22 C.F.R. § 7.5. (b)(1) (review of loss of nationality by the Board) or *8 U.S.C. § 1503* (review of loss of a right or privilege attendant to citizenship because of the determination that the individual is [**6] no longer a national). Accordingly, the absence of language pertaining to the denial of a certificate rather than approval of one in the last sentence of § 1501 cannot be construed to mean what Plaintiff argues: that while the approval of certification is an appealable final agency determination, the disapproval of certification is not. Thus, Plaintiff is mistaken; a writ of mandamus is not the only form of remedy available to him in this instance.

In the alternative, Plaintiff argues that the Secretary had no discretion to deny the issuance of a certificate of loss of

nationality. He interprets the same language of § 1501 as discussed above to mean that the Secretary has only the authority to approve certification, but not deny it. However, § 1501 makes clear that the issuance of a certificate depends upon the Secretary's approval of the consular officer's report. It states, "Whenever a diplomatic or consular officer of the United States has reason to believe that a person while in a foreign state has lost his United States nationality . . . he shall certify the facts upon which such belief is based to the Department of State . . . . If the report of . . . the officer is approved [**7] by the Secretary of States, a copy of the certificate shall be [issued]." *8 U.S.C. § 1501* (emphasis added). The approval, or disapproval, of the issuance of certification is committed by statute to the discretion of the Secretary and thus not subject to this Court's mandamus jurisdiction. See *Murphy v. FDIC, 314 U.S. App. D.C. 24, 61 F.3d 34, 40-41 (D.C. Cir. 1995).*

Plaintiff also advances a quasi-constitutional argument that the Secretary must approve his certificate because of his inherent, natural right to expatriate. Yet even if one were to concede Plaintiff's argument that an individual has a fundamental right to expatriate, the Secretary of State still would have the discretion to determine whether an individual has adequately renounced affiliation with the United States so as to trigger that right. In this case, the Secretary determined that Plaintiff had not met the relevant criteria. In § 349 of the Immigration and Nationality Act, *8 U.S.C. § 1481*, Congress set forth the circumstances under which a loss of nationality certification would issue. Section 349 makes clear that expatriation depends not only on the performance of an expatriating act, but also upon a finding [**8] that the individual performed such act "voluntarily" and "with the intention of relinquishing United States nationality." Id; see also *Afroyim v. Rusk, 387 U.S. 253, 18 L. Ed. 2d 757, 87 S. Ct. 1660 (1967); Vance v. Terrazas, 444 U.S. 252, 62 L. Ed. 2d 461, 100 S. Ct. 540 (1980).*

Plaintiff's arguments boil down to a disagreement with the Secretary of State as to whether or not he meets the relevant criterion of "intent" needed to expatriate. Plaintiff argues that he meets all of the elements: He left the United States, went to the consular's office in the Dominican Republic, and took a formal oath of renunciation. In rejecting Plaintiff's renunciation, the Department notes that Plaintiff demonstrated no intention of renouncing all ties to the United States. While Plaintiff claims to reject his United States citizenship, he nevertheless wants to remain a resident of Puerto Rico. The Immigration and Nationality Act makes it unmistakably clear that Puerto Rico [*46] is a part of the United States for such purposes. (See *8 U.S.C. § 1101*(a)(38), providing that the term "United States" for the purposes of the statute refers not only to the 50 states of the United States, but also [**9] Puerto Rico, Guam, and the Virgin Islands.) Indeed, after attempting to renounce in the Dominican Republic, Plaintiff returned to Puerto Rico without making any effort to be documented as an alien under the Immigration and Nationality Act. In other words, while claiming to renounce all rights and privileges of United States citizenship, Plaintiff wants to continue to exercise one of the fundamental rights of citizenship, namely the right to travel freely throughout the world and when he wants to, to return and reside in the United States.

Plaintiff's response to the Secretary's position is to claim a fundamental distinction between United States and Puerto Rican citizenship. Unlike the states, which cannot exist alone and apart from the United States, Plaintiff argues that Puerto Rico is a distinct and separate entity with a independent national history and identity. Thus, he objects to the Secretary of State's position that renunciation of U.S. citizenship must entail renunciation of Puerto Rican citizenship as well.

In essence, Plaintiff's complaint with the Secretary of State is over the much debated political question as to the status of Puerto Rico and its nationals in relation [**10] to

the United States. While Plaintiff may well have strong political views with regard to Puerto Rican independence and the need for a citizenship separate and apart from the United States, this is not an issue for this Court to decide. Plaintiff must seek another, more appropriate forum to express his political views.

Accordingly, it is hereby ORDERED that Defendants' Motion to Dismiss is GRANTED.

4/22/98
Date

/s/_____
Stanley Sporkin
United States District Judge

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Alberto 0. Lozada Colon,
Appellant

v.

Department of State, et al.,
Appellees

September Term, 1998
No. 98-5179
97cv01831

ENTERED: May 20, 1999
FILED: May 20, 1999

BEFORE: Edwards, Chief Judge, Sentelle and Henderson, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed May 4, 1999, it is **ORDERED** that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

/s/_____
Robert A. Bonner
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Alberto 0. Lozada Colon,
Appellant

v.

Department of State, et al.,
Appellees

September Term, 1998
No. 98-5179
97cv01831

ENTERED: May 20, 1999
FILED: May 20, 1999

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
/s/_____
Robert A. Bonner
Deputy Clerk

Supreme Court, U.S.
FILED
OCT 18 1999
OFFICE OF THE CLERK

No. 99-259

In the Supreme Court of the United States

ALBERTO O. LOZADA COLON, PETITIONER

v.

DEPARTMENT OF STATE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is entitled to a writ of mandamus directing the Secretary of State to issue him a Certificate of Loss of Nationality under 8 U.S.C. 1501.

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In the Supreme Court of the United States

No. 99-259

ALBERTO O. LOZADA COLON, PETITIONER

v.

DEPARTMENT OF STATE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is reported at 170 F.3d 191. The opinion of the district court (Pet. App. 4-10) is reported at 2 F. Supp. 2d 43.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1999. A petition for rehearing was denied on May 20, 1999 (Pet. App. 11). The petition for a writ of certiorari was filed on August 12, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was born in Puerto Rico on November 2, 1952, thereby becoming a citizen of the United States under the terms of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* See Pet. 9; Pet. App. 5;

8 U.S.C. 1101(a)(38), 1401(a). Petitioner is a lawyer, and in 1996 he ran for Mayor of the city of Mayaguez as a member of the Puerto Rican Independence Party. Pet. 9.

On September 23, 1996, petitioner appeared at a United States Consulate in the Dominican Republic and stated that he desired to renounce his United States nationality, as permitted by Section 349(a)(5) of the INA, 8 U.S.C. 1481(a)(5). See Pet. App. 5. After speaking with a consular officer, and in conformity with procedures prescribed by the Secretary of State, petitioner executed a written "Oath of Renunciation of the Nationality of the United States" and a separate "Statement of Understanding." C.A. App. 23-24; Pet. App. 5; see 22 C.F.R. 50.50(a).[1] He also submitted a separate written statement explaining his reasons for seeking to renounce United States citizenship, as permitted by the Secretary's procedures. C.A. App. 25. In his supplemental statement, petitioner asserted that he is a "Puerto Rican citizen" with an "inalienable right" to live in Puerto Rico, even after renouncing his United States citizenship. *Id.* at 25 (original statement in

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[1] The form of oath states in substance that the declarant "absolutely and entirely renounces his U.S. nationality together with all rights and privileges and all duties of allegiance and fidelity thereunto pertaining." 22 C.F.R. 50.50(a). The form of "Statement of Understanding" signed by petitioner recites, among other things, the declarant's understanding that "Upon renouncing my citizenship I will become an alien with respect to the United States, subject to all the laws and procedures of the United States regarding entry and control of aliens," and that "If I do not possess the nationality of any country other than the United States, upon my renunciation I will become a stateless person and may face extreme difficulties in traveling internationally and entering most countries." C.A. App. 24.

Spanish), 32-33 (quoting portions of statement as translated into English).

Section 358 of the INA, 8 U.S.C. 1501, provides that when a consular officer has reason to believe that an individual who is outside the United States has lost United States nationality under the terms of the Act, he or she

> shall certify the facts upon which such belief is based to the Department of State, in writing, under regulations prescribed by the Secretary of State. If the report of the diplomatic or consular officer is approved by the Secretary of State, a copy of the certificate shall be forwarded to the Attorney General, for [her] information, and the diplomatic or consular office in which the report was made shall be directed to forward a copy of the certificate to the person to whom it relates. Approval by the Secretary of State of a certificate under this section shall constitute a final administrative determination of loss of United States nationality under this chapter, subject to such procedures for administrative appeal as the Secretary may prescribe by regulation, and also shall constitute a denial of a right or privilege of United States nationality for purposes of section 1503 of this title.

See also 22 C.F.R. 50.50(b).[2] In accordance with these provisions, the consular officer who received peti-

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[2] Although 8 U.S.C. 1481(a)(5) provides for formal and explicit renunciations of citizenship, Section 1481(a) sets out a number of other acts, such as taking an oath of allegiance to a foreign state or serving as an officer in a foreign army, that will result in loss of citizenship if performed "with the intention of relinquishing United States nationality." An individual who objects to the Secretary of State's initial conclusion, on the basis of facts reported by a

tioner's renunciation papers forwarded them to the Department of State in Washington, together with a draft Certificate of Loss of Nationality (CLN). See Pet. App. 5. The Secretary of State took no immediate action with respect to petitioner's case. On August 13, 1997, petitioner filed this action in the United States District Court for the District of Columbia, seeking a writ of mandamus "compelling the Department of State to enter a decision" with respect to his renunciation and "ordering [the Department] to issue forthwith to [petitioner] a certificate of loss of nationality." C.A. App. 17, 20; Pet. App. 5-6.

2. On January 27, 1998, the Department of State informed petitioner that it would not issue him a CLN. Pet. App. 6; C.A. App. 32-33. The Department explained that it was "unable to reconcile" petitioner's asserted intention to relinquish United States citizenship with his statements concerning his "Puerto Rican" citizenship and his right to continue to live in Puerto Rico, or with its understanding that since the time of his "renunciation" petitioner had been "living in Puerto Rico and ha[d] made no effort to be documented as an alien under the [INA]." *Id.* at 32. To the contrary, the Department determined that "the intention to relinquish U.S. nationality" for purposes of 8 U.S.C. 1481(a) "does not exist where a renunciant plans or claims a

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diplomatic or consular officer, that he or she has performed an expatriating act with the requisite intent may appeal that determination to the State Department's Board of Appellate Review, and may challenge a final adverse determination by the Department under procedures set out in 8 U.S.C. 1503 (1994 & Supp. IV 1998). In any proceeding concerning loss of nationality, "the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence." 8 U.S.C. 1481(b).

right to reside in the United States, a right that is inherent in U.S. nationality, unless the renunciant demonstrates that residence will be as an alien properly documented under U.S. law." C.A. App. 33. Because it considered petitioner's "statements and actions to be inconsistent with an intent to relinquish U.S. citizenship with all the rights and privileges pertaining thereto," the Department concluded that petitioner had "not met the burden, established by Section 349(b) of the INA [8 U.S.C. 1481(b)], of showing by a preponderance of the evidence that [he] intended to relinquish U.S. citizenship when [he] executed the Oath of Renunciation." C.A. App. 32.

3. On April 23, 1998, the district court granted respondents' motion to dismiss petitioner's mandamus action. Pet. App. 4-10. Although the court noted that petitioner had sought an order compelling the Secretary not only to take some action in petitioner's case, but to issue a CLN, the court concluded that the Secretary's refusal to issue a certificate amounted to final agency action on petitioner's request, and that there were means of challenging that decision other than a petition for a writ of mandamus. *Id.* at 6-7. In any event, the court held that the language of 8 U.S.C. 1501 "makes clear that the issuance of a certificate depends upon the Secretary's approval of the consular officer's report." Pet. App. 8. Thus, "[t]he approval, or disapproval, of the issuance of certification is committed by statute to the discretion of the Secretary," and accordingly that decision was "not subject to th[e] Court's mandamus jurisdiction." *Ibid.*

Finally, the district court rejected petitioner's "quasi-constitutional argument that the Secretary must approve his [CLN] because of his inherent, natural right to expatriate." Pet. App. 8. The court reasoned that

expatriation depends in part on a finding of the requisite intent to relinquish all the benefits of United States citizenship, so that even if there is a "fundamental right" to expatriate, the Secretary "still would have the discretion to determine whether an individual has adequately renounced affiliation with the United States so as to trigger that right." *Ibid.* The court noted that, as the Secretary had determined, petitioner asserted a continuing right to remain a resident of Puerto Rico, without complying with the alien admission or documentation requirements of the INA, and thus had "demonstrated no intention of renouncing all ties to the United States" or rights and benefits of United States citizenship. *Id.* at 9. The court concluded that while petitioner might have "strong political views with regard to Puerto Rican independence," his objection to the Secretary's decision not to issue a CLN turned on "the much debated political question as to the status of Puerto Rico and its nationals in relation to the United States," which was "not an issue for [the] Court to decide." *Id.* at 9-10.

4. The court of appeals affirmed. Pet. App. 1-3. In a brief per curiam order, the court observed that a writ of mandamus may be granted only to enforce a "clear and indisputable" duty to perform a "ministerial," non-discretionary act. *Id.* at 2. The court agreed that such a writ could not be granted in this case because Section 1501 "clearly affords the Secretary discretion to determine whether a Certificate of Loss of Nationality should be issued." *Ibid.* The court also found "no merit" in petitioner's equal protection claims, which had been raised for the first time on appeal. *Ibid.* The court noted that it had no need to address "any issues concerning the availability of judicial review for persons

denied a [CLN]," and it reserved judgment on those issues. *Id.* at 2-3.

ARGUMENT

Petitioner in this case originally sought "an order compelling the Department of State to enter a decision on the approval of his petition for loss of nationality and declaring that the challenged agency *in*action is unlawful." C.A. App. 17 (emphasis added). That claim became moot in January 1998, when the Department advised petitioner that it would not approve the issuance of a Certificate of Loss of Nationality in his case. See *id.* at 32-33; Pet. App. 6. To the extent that petitioner now seeks judicial review of the substance of the Department's determination, the courts below correctly held that such review may not be obtained by way of a petition for a writ of mandamus. That decision does not conflict with any decision of this Court or of another court of appeals, and there is no reason for review by this Court.

1. A writ of mandamus may issue only to compel the performance of a "clear nondiscretionary duty," *Your Home Visiting Nurse Servs.* v. *Shalala*, 525 U.S. 449 (1999) (quoting *Heckler* v. *Ringer*, 466 U.S. 602, 616 (1984)), and only where the petitioner can show that his right to relief is "clear and indisputable," *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 384 (1953) (quoting *United States* v. *Duell*, 172 U.S. 576, 582 (1899)). Moreover, "[w]here a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" *Allied Chem. Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (quoting *Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 655, 666 (1978) (plurality opinion)); see also *United States* v. *Wilbur*, 283 U.S. 414, 420 (1931) (Mandamus "will issue only where the

duty to be performed is ministerial and the obligation to act peremptory, and plainly defined. The law must not only authorize the demanded action, but require it; the duty must be clear and indisputable.").

The courts below correctly recognized that the INA authorizes, but does not require, the Secretary of State to approve a diplomatic or consular officer's report of facts giving "reason to believe" that an individual may have lost his or her United States citizenship. See 8 U.S.C. 1501 ("*If* the report * * * is approved by the Secretary of State, a copy of the certificate shall be forwarded," etc.) (emphasis added); see also 22 C.F.R. 50.40(e), 50.50(b). Loss of citizenship is an extremely serious matter, and the Secretary does not approve the issuance of a CLN unless she is satisfied, after due consideration, that all the requirements for expatriation have been met. Under the Constitution and the INA, those requirements include not only that an individual perform specific acts (such as the taking of an oath of renunciation, or becoming an officer in a foreign army), but also that he or she perform them both voluntarily and "with the intention of relinquishing United States nationality." 8 U.S.C. 1481(a); *Vance* v. *Terrazas*, 444 U.S. 252, 258-263 (1980); *Afroyim* v. *Rusk*, 387 U.S. 253 (1967). The Secretary's obligation to consider each case of possible loss of nationality reported to her and to make appropriate factual and legal determinations cannot be fairly described as "ministerial," and the statute plainly imposes no duty on her to issue a CLN in any given case. See *Heuer* v. *Secretary of State*, 20 F.3d 424, 427 (11th Cir.) (approval of a CLN requires "more than a mere ministerial 'rubber stamp'"), cert. denied, 513 U.S. 1014 (1994); compare *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221, 235 n.5 (1986) (statements in committee report describing

Secretary of Commerce's statutory duty to certify to the President that foreign nationals are fishing in a certain manner "whenever he determines the existence of such operations" are "not the words of a ministerial duty, but [of] the imposition of duty to make an informed judgment"); but see *Whitehead* v. *Haig*, 794 F.2d 115, 118 (3d Cir. 1986) (characterizing Department's functions under Section 1501 as "ministerial" and issuance of CLN in a renunciation case as "automatic").[3]

Petitioner concedes that the Secretary must exercise discretion in the issuance of some CLNs, but he con-

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[3] As petitioner notes (Pet. 15), *Heuer* and *Whitehead* expressed different understandings of the nature of the administrative process involved in determining whether or not to issue a CLN, at least in express renunciation cases. Compare *Heuer*, 20 F.3d at 427-428, with *Whitehead*, 794 F.2d at 118. The issue in both cases was whether the issuance of a CLN constituted a "denial" of a "right or privilege as a national of the United States" for purposes of the limitation provision applicable to actions to establish nationality under 8 U.S.C. 1503(a) (1994 & Supp. IV 1998). *Whitehead* characterized the administrative function in express renunciation cases as merely ministerial, and concluded that the issuance of a CLN in such a case did not start the running of the limitation period. *Heuer* characterized the administrative process as a substantive one, and held that the period of limitation did begin to run when a CLN was issued. Congress ultimately resolved that conflict by amending Section 1501 to specify that approval of a CLN by the Secretary of State "shall constitute a final administrative determination of loss of United States nationality * * * and also shall constitute a denial of a right or privilege of United States nationality for purposes of section 1503." 8 U.S.C. 1501, as amended by the Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, Tit. I, § 106, 108 Stat. 4309; see also Br. for the Resp. in Opp. at 6-7, *Heuer* v. *United States Secretary of State*, *supra* (No. 94-161). (We will provide petitioner with a copy of our brief in opposition in *Heuer*.)

tends that there is no such discretion in express renunciation cases. Pet. 14. The terms of 8 U.S.C. 1481 and 1501 provide no basis for the distinction that petitioner suggests. Moreover, while it is true that 22 C.F.R. 50.40(a) provides for a general "administrative presumption" that "[a] person who affirmatively asserts to a consular officer, after he or she has committed a potentially expatriating act, that it was his or her intent to relinquish U.S. citizenship will lose his or her U.S. citizenship," no similar language appears in 22 C.F.R. 50.50, which deals more specifically with express renunciations under Section 1481(a)(5). If the two situations were to be distinguished, the more logical construction of the regulations, read together, would be that the presumption set out in Section 50.40(a) applies in cases in which the affirmation of intent follows one of the separate expatriating acts specified in Section 1481(a) (which would itself provide strong, independent evidence of the relevant intent), but not in cases in which a written renunciation, and any contemporaneous supporting statements, are the only evidence before the Department as it seeks to determine whether the putative renunciant understands the consequences of loss of citizenship and in fact intends to incur them. In any event, nothing in the INA or the regulations relieves the Secretary of the responsibility for making an independent judgment, before she issues a CLN, that any potentially expatriating act (including renunciation) was committed voluntarily and with the requisite intent to relinquish all the benefits of citizenship. Concomitantly, nothing disables the Secretary from taking all relevant facts and circumstances—including a putative renunciant's expressed intention to continue living in the United States without being documented

as an alien—into account in making the necessary determinations in each case.

2. Petitioner argues (Pet. 15-17) that a writ of mandamus should issue in this case because he is entitled to a determination that he has lost his United States citizenship, and because there is no other judicial mechanism available for him to litigate that claim. As the court of appeals recognized (Pet. App. 2-3), however, mandamus is unavailable in this case in any event, because petitioner has no "clear and indisputable" right to compel the Secretary of State to conclude that petitioner has met the statutory and constitutional requirements for expatriation, or to issue any document purporting to certify that she has reached such a conclusion when in fact she has not. The court of appeals accordingly found it unnecessary to consider whether petitioner might have other means of seeking a judicial determination concerning his citizenship, and there is no more reason to pursue that question here.[4]

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[4] We note that there is no obvious reason why a judicial forum would be available to consider petitioner's contentions so long as the Secretary's determination to continue regarding him as a citizen has only consequences that would normally be regarded as benefits, rather than burdens, to petitioner (such as recognition of his right to vote in national elections, or to live and work in Puerto Rico without having been documented as a resident alien under the INA). Should the United States seek to compel petitioner's performance of some affirmative duty to which only citizens are liable, such as serving on a jury, then presumably petitioner could seek to establish, as an affirmative defense to enforcement of that duty, that his 1996 renunciation of citizenship was effective under the Constitution and the INA, notwithstanding the Secretary's determination to the contrary. Cf. 8 U.S.C. 1481(b) (imposing burden of proof on any loss-of-nationality claim on the party who claims that loss took place).

Similarly, there is no reason for this Court to entertain petitioner's unsupported (and barely elaborated) claim that the Secretary of State's determination not to issue a CLN in his case represents "discriminat[ion] against [petitioner] based on his Puerto Rican nationality" (Pet. 17). As the court of appeals observed (Pet. App. 2), petitioner waived that meritless allegation by failing to raise it in the district court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 99-259

In The
Supreme Court of the United States

ALBERTO O. LOZADA COLON,

Petitioner,

v.

DEPARTMENT OF STATE, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

The Solicitor General argues that a judicial forum should not be available to Petitioner's contentions because he continues to be regarded as a United States (U.S.) citizen, a benefit rather than a burden. (Res. 12, footnote 4). Petitioner disagrees with the logic of the Solicitor General.

After the codification of the Expatriation Act of March 2, 1907, 34 Stat. 1228 (1907), clearly renouncing ones citizenship was a right reserved for U.S. citizens. There are two distinct concepts that can occur in the loss of U.S. citizenship process: (1) an "expatriation," when an individual voluntarily relinquishes his nationality; or (2) a "denationalization," the involuntary removal of an individual's citizenship by a government. See Laurence Abramson, United States Loss of Citizenship Law After Terrazas: Decisions of the Board of Appellate Review, 16 N.Y.U. J. Int'l L.&Pol.829, 831 (1984). While U.S. law has recognized the right of voluntary expatriation since 1868, Congress did not enumerate the specific conducts that could result in involuntary loss of citizenship until 1907. 4 Gordon et al., Immigration Law and Procedure, 100.03[2][b][iii]. Under the Immigration and Nationality Act (INA), loss of citizenship can be based either on voluntary expatriation or involuntary denationalization. With respect to contested loss of citizenship cases under the INA, it is more precise to refer to congressional denationalization rather than expatriation. See Abramson, supra, at 832 (discussing congressional denationalization).

Thus, the logic of the Solicitor General that the denial of a Certificate of Loss of Nationality (CLN) is a benefit rather than a burden is not supported by case law and the history of the Expatriation Act. The issuance of a CLN in a voluntary renunciation is not the denial of a right based on a claim as a U.S. national but, rather, the grant of a right as a U.S citizen, e.g., to renounce voluntarily American citizenship. Heuer v. Secretary of State, 20 F.3d 424, 427 (11th Cir. 1994), citing

Maldonado-Sanchez v. Shultz, 706 F. Supp. 54, 56-57 (D.D.C. 1989). However, the involuntary removal of an individual's citizenship by a government would constitute denationalization, which may involve the denial of a right as a U.S. citizen. Here, Petitioner voluntarily, intentionally and unequivocally conducted an irrevocable expatriation act.

Moreover, the foundation of the U.S. rested on the right to expatriation. The Declaration of Independence itself was a Lockean justification of expatriation. See Peter Schuck & Rogers M. Smith, Citizenship Without Consent: Illegal Aliens in the American Polity at 49 (1985). Congress passed the Expatriation Act of 1868 one day before the ratification of the Fourteenth Amendment. Id. at 86. The Expatriation Act "clearly established the principle that membership in the political community must always reflect the individual citizen's consent, a consent that must remain vital and continuing lest the individual withdraws it." Id. at 86-87. "[T]his unequivocal right of self-expatriation was eventually understood to have created a fundamental asymmetry in the nature of American citizenship, one in which an individual citizen could always sever the political relationship by withdrawing his consent anytime, but the government could never do so." Id. at 87.

The Solicitor General also contended that Petitioner's right to vote, live and work in Puerto Rico is contingent upon him remaining a U.S. citizen or as an alien properly documented under INA. (Res. 12, footnote 4). Petitioner disagreed with the Solicitor General argument advanced here.

In Miriam J. Ramirez de Ferrer v. Juan Mari Bras, No. CT-96-14 (P.R. 1997), the Supreme Court of Puerto Rico held that "[t]he citizenship of Puerto Rico has its own vitality, independent from the United States citizenship, and its juridical source is the Constitution of the Commonwealth" See also Martinez v. Asociacion de Señoras, 213 U.S. 20 (1909) (a body politic, under the name of the People of Puerto Rico, with a citizenship of its own, is created). Also, other courts have considered Puerto Rico a country. See id. at 25; Pekpe v.

United States, 183 U.S. 176, 181-82 (1901). Moreover, although Puerto Rico since 1917 was connected to the American nation, it was not an integral part of the same. See Balzac v. Puerto Rico, 258 U.S. 298 (1922). The grant of U.S. citizenship did not alter the essential character of Puerto Ricans as a people different from the American people. Id. at 311. "It enabled them to move into the continental United States and become residents of any State there to enjoy every right of any other citizen of the United States civil, social and political." Id. at 308.

The issue in the Mari Bras case was whether a citizen and national of Puerto Rico who had renounced his U.S. citizenship and been issued a CLN by the Department of State was able to vote in Puerto Rico's general elections. The Supreme Court said that since he was a citizen and national of Puerto Rico domiciled on the island, he was a qualified voter. Mari Bras' vote was counted in Puerto Rico's national elections.

Moreover, the Solicitor General's argument is similar to the one made by Department of State before the U.S. District Court. In justifying the denial of Petitioner CLN, the Department of State has Characterized the status of Puerto Rico as an incorporated territory similar to Washington, D.C.[1]

A decision to deny the CLN based on the argument that Puerto Rico is part of the U.S. and similar to the District of Columbia, i.e., an incorporated territory, or a state is an issue settled by the Courts. Puerto Rico has never been incorporated into the U.S. It is a foreign possession that merely belongs to but is not part of the U.S. Id. 305-06, with a Compact to work on their relations between the people of the possessed territory and Congress. Since Puerto Rico is a foreign possession in the domestic sense, Congress can legislate for the island, basically without constitutional limits in many areas. The approval of the

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[1] However, the issue at bar is whether the Secretary of State has discretion to deny a CLN involving a voluntary renunciation under 8 U.S.C. section 1481(a)(5) and Section 358 of the INA, 8 U.S.C. section 1501.

Foraker Act, 31 Stat. 77 (1900) and Jones Act, 39 Stat. 951 (1917), which are still in effect today, prevents immigration laws from excluding Puerto Rican citizens and nationals who are not U.S. citizens from their motherland. Congress may treat Puerto Rico differently from a state so long as there is a rational basis for its action. Harris v. Rosario, 446 U.S. 651, 651-52 (1980) (per curiam opinion); see also Califano v. Torres, 435 U.S. 1 (1978) (Congress can exempt Puerto Rico from receiving supplemental Social Security benefits if they reside in Puerto Rico); Secretary of Agriculture v. Central Roig Refining Co., 338 U.S. 604 (1950) (Sugar Act of 1948 applying quotas of sugar coming from Puerto Rico into the U.S. constitutionally valid). Moreover, authority over maritime matters was delegated to Puerto Rico, which would have been unconstitutional if delegation were made to a state or an incorporated territory. Lastra v. New York & Puerto Rico S.S. Co., 2 F.2d 812 (1st Cir. 1924); Guerrido v. Alcoa Steamship Co., 234 F.2d 349 (1st Cir. 1956); Fonseca v. Prann, 282 F.2d 153 (1st Cir. 1960), cert. denied, 365 U.S. 860 (1961); Torres v. Sea Land Services, Inc., 597 F.2d 284 (1st Cir. 1979). Congress has never purported to effect such an incorporation for Puerto Rico. Downes v. Bidwell, 182 U.S. 244 (1901). Therefore, for the same reasons that Puerto Rico is currently not incorporated within the meaning of the phrase "the United States" for purposes of application of the uniformity clause of the Constitution, U.S. Const. amend. I, § 8, cl. 1, Puerto Rico is not incorporated within the meaning of the "United States" for purposes of the citizenship provisions of the Fourteenth Amendment and the INA. Cf. Downes v. Bidwell, Id. at 313 (Opinion of White, J.) (noting serious problems that would arise if, upon the acquisition of a foreign territory, all the inhabitants thereof would automatically and as a matter of right become citizens of the United States). Thus, the Secretary of State not only lacks discretion under the statute to deny a CLN to a person who relinquish his U.S. citizenship voluntarily under 8 U.S.C. section 1481(a)(5) and 8 U.S.C. 1501 but also

the reasoning to deny the CLN here was wrong and contrary to law.[2]

The denial of a CLN has left Petitioner without any legal remedy. The final administrative determination is not final, as Respondent agrees here, because until a CLN is approved and issued, any act of expatriation, whether or not intentional, is simply an act without significance to nationality. See Heuer v. Secretary of State, supra 20 F.3d at 427. Here, for example, without the CLN the Petitioner cannot claim he is only a national and citizen of Puerto Rico because he is still remains a U.S. citizen. However, if the CLN is issued,

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[2] Everyone has the right to change his nationality. Art. 15, Universal Declaration of Human Rights, U.N. Doc. E./CN.4/95 (1948). Additionally, Art. 19, American Declaration of the Rights and Duties of Man, as well as Art. 20, American Convention on Human Rights, the two human rights conventions under which the Organization of American States enforces human rights protections in this hemisphere, recognize the fundamental right to change one's nationality. The international human rights, treaties, and conventions unequivocally mandate as a universally recognized principle of international law (*jus cogens*) the right of Petitioner to relinquish his U.S. citizenship. These international laws also apply to the U.S.

In Bacardi Corp. of America v. Domenech, Treasurer of Puerto Rico, 311 U.S. 150, 150 (1940), in a headnote it is stated that "[a] Treaty, on ratification, becomes a part of the law, and no special legislation is necessary to make it effective." The U.S. Supreme Court has also stated in The Paquete Habana, 175 U.S. 677, 700 (1900) (citing Hilton v. Guyot, 159 U.S. 113, 163-64, 214-15 (1895)), that

> [i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the custom and usages of civilized nations; and as evidence of these, to the works of jurists and commentators. . . for trustworthy evidence of what the law really is.

Petitioner has the recourse of judicial review to correct any deficiencies in the document; e.g., to read citizen and national of Puerto Rico rather than a stateless person. Because he has been denied a CLN, Petitioner cannot address the issue of statelessness upon his renunciation of U.S. nationality. Evidence in the record indicated that even if the Secretary of State had issued the CLN, it has not recognized Petitioner's Puerto Rican citizenship and nationality. However, since the Secretary of State did not issue the certificate, Petitioner is without judicial remedies other than to file a writ of mandamus to obtain the proper CLN and obtain judicial review if the CLN does not comply with the law. Moreover, [t]he requirement that a duty be 'clearly defined' to warrant issuance of a writ does not rule out mandamus actions in situations where the interpretation of the controlling statute is in doubt." Roberts v. United States, 176 U.S. 221, 231 (1990).

The Solicitor General argues that the terms of 8 U.S.C. 1481 and 8 U.S.C. section 1501 provide no basis for the distinction that Petitioner suggests here. (Res. 10 and Pet. 14). The Petitioner suggests that if there is any discretion reserved in the statute it must be confined for involuntary renunciation. The regulations appear to be clear, 22 C.F.R. 50.50 directs the diplomatic or consular officer to forward to the Department for approval the oath of renunciation together with the CLN. The manner that the Secretary of State should approve the CLN is found in 22 C.F.R. section 50.40(a), entitled Certification of loss of U.S. nationality. The regulation specifically states that "A person who affirmatively asserts to a consular officer, after he or she has committed a potentially expatriating act, that it was his or her intent to relinquish U.S. citizenship will lose his or her U.S. citizenship." The regulation which interprets the statute implies that the Department of State must issue the CLN in all voluntary renunciation cases. The authority to approve the CLN which involves

placing a date stamped that reads approved[3] is a function that pertains the Department of States Overseas Citizens Services Division. Therefore, the diplomatic or consular officer is obligated to forward the papers to the Department of State for the date stamped that read approved.

Moreover, involuntary renunciations are covered by 22 C.F.R. section 50.40(c). The regulation states in pertinent part:

> (c) Whenever a diplomatic or consular officer has reason to believe that a person, while in a foreign country, has lost his U.S. nationality under any provision of Chapter 3 of Title III of the Immigration and Nationality Act of 1952, or under any provision of Chapter IV of the Nationality Act of 1940, as amended, he shall prepare a certificate of loss of nationality containing the facts upon which such belief is based and shall forward the certificate to the Department.

However, the diplomatic or consular officer must ascertain an affidavit with the consent of the person that indeed he or she had the intent to relinquish citizenship by the voluntary and intentional performance of one of the acts specified in Section 349(a), 8 U.S.C. section 1481(a), for example, obtaining a diplomatic post with a foreign government. See 22 C.F.R. section 50.40(b). The diplomatic or consular officer shall attach such affidavit to the CLN and forward it to the Department of State.

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[3] The use of the word "approve" in the regulations should not be read to imply discretion. It simply directs the performance of a ministerial matter in voluntary renunciation cases.

Thus, the regulation makes a clear distinction that 22 C.F.R. section 50.40(a) is reserved for the voluntary renunciation when issuing a CLN and (b) and (c) are reserved for involuntary renunciations. Under 22 C.F.R. section 50.40(a), the person who voluntarily renounce his U.S. citizenship pursuant to 8 U.S.C. 1481(a)(5) will automatically receive a CLN.

Petitioner's equal protection claim is properly raised before this Court. Furthermore, Respondant's argument that Petitioner raised the equal protection claim for the first time is incorrect. (Res. 12). Petitioner writ of mandamus petition specifically raised the issue and argued that by not adjudicating Petitioner's CLN, e.g., issuing him the CLN, and providing other similarly situated individuals with a CLN, discriminated against Petitioner. This argument is found in Petitioner's writ of mandamus petition filed with the U.S. District Court. See section IX "Argument and Conclusion" of petition for writ of mandamus.[4] However, even if Petitioner raised the issue for the first time before this Court, the Court may in its discretion consider a Constitutional issue such as equal protection for the first time on appeal. See Milhouse v. Levi, 548 F.2d 357, 363 (D.C. Cir. 1976) (although issue of Ex Post Facto Clause violation had not been presented to the district court, the court would nevertheless hear it since the issue was one of law which did not require further factual development). Citing Holmer v. Helvering, 312 U.S. 552, 557. Therefore, Petitioner no only raised the issue at the U.S. District Court for the District of Columbia but also raised the issue before the U.S. Court of Appeals for the D.C. Circuit and here.

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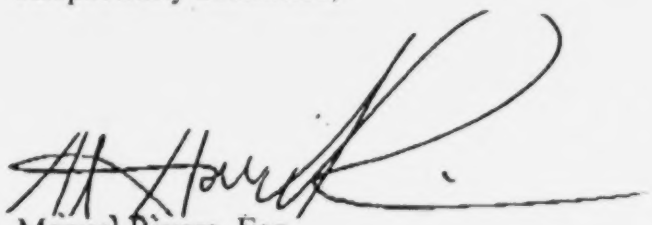
[4] The exact language used in the petition for writ of mandamus filed with the U.S. District Court for District of Columbia reads as follow: " Defendants have no legitimate interest in denying Plaintiff's adjudication of his petition for loss of nationality according to the statute and regulations, in discriminating against the Plaintiff (by providing decisions to other applicants for loss of nationality and withholding same to Plaintiff)"

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



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